

¹ Rule 10 (Court of Appeals), Amendment 1, 2011-2012, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by a unanimous opinion or by a formal opinion which has no precedential value. When a case is decided by a unanimous opinion it shall be designated "1111111111111111," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

Plaintiff/appellant, Billy R. Stone, appeals the order of the trial court granting a motion to dismiss filed by defendant/appellee, BellSouth Telecommunication, Inc.

The facts are not in dispute. On October 11, 1993, plaintiff filed a complaint alleging that on October 12, 1992, he tripped over a telephone line negligently placed by defendant. A voluntary nonsuit was taken on the original complaint by order entered July 22, 1997. The case before us was filed on July 21, 1998, and summons was issued that day to the Sheriff of Hamilton County. However, the summons was not returned, and plaintiff issued alias summonses on July 20, 1999. The summonses were served by certified mail on August 5, 1999.

Defendant filed a motion to dismiss on the grounds that plaintiff's complaint was time barred. The trial court granted defendant's motion to dismiss the complaint. The order states:

The defendants' Motion to Dismiss the Complaint is granted. Although the Court does not believe that the case is barred by the Statute of Limitations, the Court is of the opinion that the plaintiff has not diligently prosecuted his claim, which is for an injury that allegedly occurred on October 12, 1992.

Accordingly, the Complaint is dismissed with prejudice. Costs are assessed to the plaintiff and sureties, for which execution may issue.

SO ORDERED, this the 25th day of October, 1999.

Plaintiff has appealed, and the only issue for review is whether the trial court erred in granting defendant's motion to dismiss.

Plaintiff asserts that the trial court erred in finding that he had not diligently prosecuted his personal injury claim. He asserts that the prior suit was voluntarily nonsuited and timely refiled pursuant to T.C.A. § 28-1-105 (Supp. 1999). He argues that any failure to prosecute must be based on actions taken in the suit before us. Defendant asserts that the entire history of the case, including plaintiff's failure to answer discovery requests associated with the original complaint, should be taken into consideration. We disagree.

The "savings statute" accords unto a plaintiff who files a second action within one year of the voluntary nonsuit of his first suit the same procedural and substantive benefits which were available to the plaintiff in the first action. *See Energy Saving Products, Inc. v. Carney*, 737 S.W.2d 783 (Tenn. Ct. App. 1987). Since the plaintiff timely refiled his suit, his actions in prosecuting the suit should be judged in accordance with the properly filed complaint. We, by no means, condone the conduct of plaintiff's attorney in his prosecution of the complaint originally

filed. By the same token, it appears that that case could have been moved forward more expeditiously had defendant's counsel utilized the available rules of procedure. Needless to say, it appears inexcusable that that case languished in the court for approximately four years before it was voluntarily dismissed. However, we are dealing with the lawsuit filed July 21, 1998.

Plaintiff issued summons the date the suit was filed, and when it was not returned, he issued alias summonses within one year of the issuance of the original summons. This is authorized by the rules. *See* Tenn.R.Civ.P. 3.

Up to this point, plaintiff has prosecuted his suit within the time limits established by our rules. Thus, as to the present action we cannot say that the plaintiff has not diligently prosecuted his suit.

Accordingly, the order of the trial court dismissing the complaint is reversed, and the case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellee, Bellsouth Telecommunications, Inc., and its surety.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.